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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TICOR TITLE INSURANCE COMPANY, *et al.*
Petitioners,
v.
FEDERAL TRADE COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Third Circuit held that insurance-related title search and examination is not part of the "business of insurance" under the McCarran Act [1] even though it is the very means by which the title insurer identifies and determines the risks to be assumed when it issues a title insurance policy. The Federal Trade Commission also acknowledges the role of this activity in the insurance process, but nonetheless like the Third Circuit characterizes search and examination as "a separate, non-insurance line of business" (Opp. 9), largely because it is *also* useful for non-insurance purposes and outside the insurance context. Review by this Court is warranted because the Third Circuit decision is contrary to the analysis of

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[1] McCarran-Ferguson Act § 2(b), 15 U.S.C. § 1012(b).

this Court in *Pireno*,[2] squarely conflicts with decisions of the Tenth Circuit and every other federal court that has considered the issue, and raises significant questions concerning proper analysis of underwriting activities in all insurance lines.

1. The FTC repeatedly attempts to characterize the decision below as narrow and fact-specific (*e.g.* Opp. 7), but these efforts cannot mask the fact that the Third Circuit decision raises fundamental issues concerning the proper mode of McCarran Act "business of insurance" analysis. The FTC defends the Third Circuit's conclusions that insurance-related search and examination does not "ha[ve] the effect of transferring or spreading a policyholder's risk," and is not "an integral part of the policy relationship between the insurer and the insured," based on a simple theory.[3] The FTC concedes, as it must, that title insurers implement their "business decision to limit the scope of the risk they will assume" (Opp. 11) through "underwriting policies [which] require any revealed defects in title [shown by the search and examination] to be excepted from coverage" under the title insurance policy (Opp. 8). Despite this crucial role played by search and examination in identifying and determining the risks transferred under the title insurance policy, both the Third Circuit and the FTC deem the activity outside the "business of insurance" because it also plays a role in the process of transferring real estate. On this theory, the FTC deems it dispositive that search and examination re-

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[2] *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982).

[3] *Pireno*, 458 U.S. at 129. The FTC argues that the rate-filing activities also fail the third *Pireno* criterion even though the rates were charged only by title insurers and agents for their own insurance-related search and examination activities, because in its view title insurers themselves are "entities outside the insurance industry" when they engage in allegedly "non-insurance activities" like title search and examination. Opp. 9, 11-12. This is a truly breathtaking example of reasoning that assumes what it seeks to prove.

quires certain "legal judgments" (which the FTC contrasts with "underwriting discretion"), and is useful from the standpoint of a real estate transaction (as well as the title insurance transaction). Opp. 7-8, 9-11 (discussing the history of real property conveyancing with an emphasis on periods and regions of the country in which title insurance was not common or did not exist). Under the same theory, the Third Circuit thought it critical that search and examination is not "peculiar to the insurance industry" but is also performed by others in non-insurance contexts. Pet. App. 11a, 13a.[4]

The importance of this Court's review rests not on "speculative fear [of a] dictum in the court of appeals' opinion" (Opp. 14), but on the implications (and error) of the fundamental analysis applied by the court below. Indeed, the petition shows that the Third Circuit's test, requiring that an insurer activity must "itself" transfer risk and be "peculiar to the insurance industry" in order to constitute the "business of insurance," narrows the McCarran exemption to virtual meaninglessness. Pet. 10, Opp. 8-9 n.3. Yet in its brief the FTC fails to identify *any* insurer activity, other than merely signing an insurance policy, that would satisfy the Third Circuit's test.

2. The FTC dismisses the square conflict between the Third Circuit decision below and the Tenth Circuit's

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[4] The FTC's recasting of the question presented as pertaining to "separately stated" charges made by title insurers is factually inaccurate. The findings of the administrative law judge (which were adopted by the FTC) show that in three of the four states at issue (Arizona, Connecticut and Montana), the costs of search and examination activities performed by the insurers or their agents were covered by an undifferentiated premium rate that did not break these activities out as separate charges. Pet. App. 171a-173a. For a period of time in Wisconsin, the rate structure did contain a distinct search and examination charge, but this designation was eliminated in 1984. Pet. App. 173a.

Commander Leasing decision[5] by arguing that *Commander Leasing* and the other conflicting cases reflect an "obsolete expansive reading" of the McCarran Act exemption that did not survive this Court's decision in *Royal Drug*.[6] Opp. 14. However, *Royal Drug* did not purport to be, and was not, a wholesale rejection of McCarran Act precedent, but instead built consistently on this Court's prior decisions, the legislative history of the McCarran Act and the historical understanding of the meaning of the "business of insurance." 440 U.S. at 210-230.[7] Moreover, as noted in the petition at 13-15, both *Royal Drug* and *Pireno* rested in significant part on the concept of the "logical and temporal connection to the transfer of risk" that also underlay *Commander Leasing* and the earlier title insurance cases. Indeed, the notion that *Royal Drug* was a repudiation of all prior cases and invalidated the principle of *Commander Leasing* is contradicted by the FTC's own *Equifax* decision,

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[5] *Commander Leasing Co. v. Transamerica Title Insurance Co.*, 477 F.2d 77 (10th Cir. 1973).

[6] *Group Life & Health Ins. Co. v. Royal Drug*, 440 U.S. 205 (1979).

[7] This Court in *Royal Drug* rested its analysis in part on an assessment of the contemporary understanding, at the time the McCarran Act was passed, of the activities embraced by the "business of insurance." 440 U.S. at 225-230. Though the FTC suggests that the case is not pertinent, Opp. 10 n.4, this Court's decision in *United States v. Home Title Ins. Co.*, 285 U.S. 191 (1932), shows that contemporary understanding treated title insurers' search and examination activities as being part of the insurance business. In the course of concluding that the title insurer there was an "insurance company" for tax purposes, this Court noted that "preliminary to the issue (sic) of title insurance policies . . ., [the insurer] prepared abstracts and made examination of the title" and charged "fees for examinations, searches, and other service incident to the transaction." 285 U.S. at 192-193. This Court concluded that "[u]ndeniably, insurance is its principal business. Indeed, it does not appear that any part of its transactions was not connected with or the outgrowth of insurance." *Id.* at 195.

which was decided after *Royal Drug* and cited *Royal Drug* on its way to concluding that gathering information for purposes of determining "whether to underwrite a risk . . . could *only* be viewed as the business of insurance." [8]

The FTC contends that the Third Circuit decision is consistent with recent cases in the lower courts that have rejected an "elastic" interpretation of the McCarran Act exemption. Opp. 12-13. But none of the cases cited by the FTC involved insurer underwriting activities that determined the very scope of the risk to be transferred.[9] The *TIRBA* case [10] on which the FTC heavily relies (Opp. 13) involved the provision by title insurers of real estate escrow services, which the Ninth Circuit and the United States Justice Department agreed were not "central . . . to the definition and acceptance of risk" under a title insurance policy. 700 F.2d at 1251. Indeed, not only did the civil complaint in *TIRBA*, which was filed by the United States against the same Arizona rating bureau at issue in this case, limit the case to escrow services and omit any allegations based on search and examination activities, but in its briefs in that case the United States distinguished *Commander Leasing* precisely on the ground that it involved "performance of a title search." [11]

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[8] *In re Equifax Inc.*, 96 F.T.C. 844, 1101 (1980) (emphasis added).

[9] *Insurance Bd. Under Social Plan of Bethlehem Steel Corp. v. Muir*, 819 F.2d 408 (3d Cir. 1987) (claims processing services performed under contract for another insurer); *Perry v. Fidelity Union Life Ins. Co.*, 606 F.2d 468 (5th Cir. 1979) (insurance premium financing); *Cody v. Community Loan Corp.*, 606 F.2d 499 (5th Cir. 1979) (insurance premium financing).

[10] *United States v. Title Ins. Rating Bureau of Arizona*, 700 F.2d 1247 (9th Cir.), *cert. denied*, 467 U.S. 1240 (1984).

[11] United States Memorandum of Law and Reply to Defendants' Opposition to the United States' Motion for Summary Judgment and in Opposition to the Defendants' Cross Motion for Summary Judgment at 10 n.15, *United States v. Title Ins. Rating Bureau of*

3. The FTC insists it is unrealistic to view the Third Circuit decision as presenting a risk to McCarran Act protection for underwriting activities in other insurance lines. Opp. 14-15. But the correctness of the analysis applied by the Third Circuit and the FTC is a question of broad importance for many other insurance lines. Underwriting activities by their nature do not "in themselves" transfer risk, and rarely if ever are they "peculiar to the insurance industry." Like search and examination in the title insurance context, underwriting activities in other lines commonly involve application of specialized expertise pertaining to the character of the risk being insured, may have great importance for the policyholder outside the context of the insurance transaction, and frequently are identical to activities performed by non-insurers for non-insurance purposes.

Life and health insurance underwriting, for example, frequently involves medical examinations or tests, which the Third Circuit decision below expressly suggests would not satisfy its "business of insurance" test even if performed for purposes of underwriting insurance coverage. Pet. App. 11a. These activities resemble title search and examination in many respects pertinent to the Third Circuit and FTC analysis: they do not "in themselves" transfer risk, they involve specialized medical judgments rather than insurer discretion, they have an historical pedigree independent of their use for insurance purposes, and they are frequently performed for reasons other than obtaining insurance. Like the search and examination, whose results may be important not only for the title insurance transaction but also for the applicant's decision to purchase or finance real estate, the results of an insurance-related medical examination or test may have importance for the insurance applicant far beyond the context of the

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Arizona, 1982-1 Trade Cas. (CCH) ¶ 64,483 (D. Ariz. 1981) (No. CIV 80-769 PHX CAM), *affirmed* 700 F.2d 1247 (9th Cir.), *cert. denied*, 467 U.S. 1240 (1984).

insurance transaction itself.[12] The same is true for expert assessments of building conditions made in the course of fire insurance underwriting, which may prompt correction of building defects that protect the health and safety of the building's occupants.

The FTC's assertions concerning the limited implications of the Third Circuit decision are contradicted by the amicus briefs filed in support of the petition by the National Association of Insurance Commissioners (NAIC) and the National Council of Insurance Legislators (NCOIL). These organizations, made up of those at the state level who bear the burden of insurance regulation, recognize the Third Circuit decision as contrary to the realities of the insurance business and an unprecedented restriction of the state regulatory autonomy guaranteed by the McCarran Act. Because the Third Circuit decision holds for the first time that an insurer's underwriting activities—the process by which it identifies and determines the risks it will assume from its policyholder under the insurance policy—are not the "business of insurance," the decision has serious implications for *all* insurance underwriting activities and warrants review by this Court.

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[12] A notable example is the decision of basketball legend Earvin "Magic" Johnson to retire from professional play in November 1991 after the results of a life insurance blood test disclosed that he was infected with the human immunodeficiency virus. Susan Pulliam, *Fateful Aids Test On Magic Johnson Was For Insurance*, WALL ST. J., Nov. 8, 1991, at A1. Recognizing the larger importance of insurance underwriting procedures focusing on such matters, many States have established insurance laws or regulations to ensure accuracy or otherwise regulate the use of HIV testing in insurance underwriting. E.g. Fla. Stat. Ann. § 626.429(4)(d); Vernon's Tex. Ann. Rev. Civ. Stat. Art. 21.21-4(b); Colo. Rev. Stat. § 10-3-1104.5(3)(d); D.C. Code § 35-224; Ohio Rev. Code § 3901.46(D); Georgia Reg. 120-2-43-.06; 760 Indiana Admin. Code 1-39-5, § 5(2); 211 Code Mass. Reg. 36.99 Appendix; Oregon Admin. Rule 836-50-250(1); Pennsylvania Regs. Title 31 § 90c.5; West Va. Regs. 114-27-5.9.

The FTC's sanguine view that the Third Circuit's decision will not affect potential federal preemption under the ERISA statute [13] also is unfounded. Relying on a distinction made in this Court's recent *Fabe* decision,[14] the FTC confidently predicts that the scope of potential ERISA preemption would be judged pursuant to the "business of insurance" reference contained in the McCarran Act's savings clause for state regulation, rather than the "more narrowly circumscribed" reference to the same term in the McCarran Act clause establishing the federal antitrust law exemption. Opp. 15. That prediction is not only unsupported but is contrary to this Court's past decisions interpreting the meaning of the "business of insurance" under ERISA, which have expressly looked to cases applying the analysis of the federal antitrust exemption, and specifically the three-part *Pireno* analysis, in determining the scope of ERISA preemption.[15] In light of such precedent it is highly likely that the Third Circuit's decision will be followed for purposes of determining ERISA preemption, which could restrict the authority of the States to regulate underwriting activities in lines of insurance provided pursuant to employee benefit plans.

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[13] Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*

[14] *United States Dep't of Treasury v. Fabe*, 113 S.Ct. 2202, 2209 (1993).

[15] *Pilot Life Ins. Co. v. Deadeaux*, 481 U.S. 41, 48-49 (1987); *Metropolitan Life Ins. Co v. Massachusetts*, 471 U.S. 724, 742-744 (1985).

CONCLUSION

Because of the important issues presented by the decision below, the Court should grant the petition for writ of certiorari to review the question presented.

Respectfully submitted,

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